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IN THE

Supreme Court of the United States

October Term, 1968

No. 1122

THE FUND OF FUNDS, LTD.,

Petitioner,

—against—

ETHEL ROTH (Suing as a stockholder in the name and in behalf of Dreyfus Corporation),

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MAY IT PLEASE THE COURT:

Petitioner, The Fund of Funds, Ltd. (FOF), a 10% owner of the common stock of Dreyfus Corporation (Dreyfus), the shares of which are listed on the New York Stock Exchange, bought and sold 33,200 shares of the common stock of Dreyfus on the floor of the New York Stock Exchange and through the facilities of the New York Stock Exchange in an off-board transaction in New Yerk City at a profit of $154,019.50. The purchase and sale orders were received in New York City; confirmation of the purchases and sales were mailed from New York City; commissions for the purchases and sales were received by New York-based brokerage firms in New York City; payment for the purchases and sales was made through the Bankers Trust Company, 16 Wall Street, New

York City and share certificates were delivered through the Bankers Trust Company, 16 Wall Street, New York City. In short, virtually every material aspect of the transactions in issue took place in New York City.

On the foregoing facts, the United States District Court for the Southern District of New York (Metzner, *J.*) correctly held that the Court had jurisdiction over the subject matter and granted summary judgment in favor of respondent, Ethel Roth, suing as a stockholder in the name and in behalf of Dreyfus under Section 16(b) of the Securities Exchange Act of 1934. The United States Court of Appeals for the Second Circuit, in a *per curiam* opinion, affirmed the grant of summary judgment.

The petition of FOF states no compelling reason why this case should be heard by the Supreme Court of the United States.

FOF's petition for certiorari essentially makes five points.

1. FOF argues that because it is a foreign corporation, when it transacts business through the New York Stock Exchange, in New York, through New York brokers and New York banks, the transaction should be deemed to be transacted "without the jurisdiction of the United States."

The facts afford a plain and simple answer to this contention.

2. FOF argues that § 16(b) of the Securities Exchange Act of 1934 is "arbitrary" (pp. 2, 4, 9) and should be ignored as a standard for petitioner's proper behavior, apparently because "FOF . . . is one of the largest mutual funds in the world outside of the United States" (p. 5).

With all due respect to this Court, the question whether § 16(b) imposes an "arbitrary" or desirable fiduciary

standard of behavior on those engaged in securities transactions is a matter that has been resolved by Congress. It is to Congress not the courts that FOF, in all its grandeur, should look for relief from the standards for the market that the national legislature has commanded.

3. FOF argues that it would be in the best interests of the United States to encourage foreign investment in this country by relieving foreign investors, whoever their stockholders may be, from the fiduciary obligations imposed by Congress on American citizens engaged in the same business in the same place.

The only basis for rejecting the standards of fiduciary obligation imposed by Congress are general propositions that additional foreign investments would be helpful to the American economy. Even if this is true, the question of the price to be paid for encouraging foreign investments is one that falls within the legislative and not the judicial realm. The balance of trade would probably be favorably affected by "floating the dollar." This hardly suggests that it is for the courts to decide to ignore Congressional legislation fixing the price of gold.

4. FOF argues that the "simplistic" (pp. 10, 12) view of the court below, *i.e.*, reading the statute according to its terms, requires correction by this Court. The "Second Circuit . . . is demonstrably unwilling to grasp the complexity and gravity of the problem." (p. 11.) The demonstration apparently consists of the fact that all the courts that have dealt with the question have reached the same reading of the statute (pp. 10-11), and this is offered as proof of the Second Circuit's "own uninformed and restrictive view." (p. 14.)

This argument by adjectives calls for no response.

5. Finally, FOF contends that if § 30(b) is not construed to apply to the transaction in question, it would have no meaning whatsoever.

The decisions of the lower courts clearly indicate the exemption offered by § 30(b) to transactions of "business in securities without the jurisdiction of the United States."

The courts below read the plain language of the statutory provisions to mean what they say: transactions in securities outside the jurisdiction of the United States are not subject to the provisions of § 16(b); transactions in securities within the jurisdiction of the United States are subject to the provision of § 16(b). The transaction involved in this litigation took place within the jurisdiction of the United States.

Certiorari should be denied.

Respectfully submitted,

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